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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

**Appellate No. 264**

EDGAR SMITH,

*Petitioner,*

*vs.*

STATE OF NEW JERSEY,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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## TABLE OF CONTENTS


| | PAGE |
|---|---|
| I—Reference to Official Reports of Opinions Delivered in the Court Below | 1 |
| II—Counter-Statement Concerning Jurisdiction | 2 |
| Counter-Questions Presented | 2 |
| A. As to the appeal of the conviction below | 2 |
| B. As to the appeal of the denial of motion for a new trial below | 3 |
| III—Counter-Statement of the Case | 4 |
| IV—Summary of the Argument | 12 |
| Preliminary Statement | 13 |
| V—The Argument: | |
| *Point One*—No federal question was ever raised or presented for decision to the Supreme Court of New Jersey on the appeal of the conviction below, but on the contrary, the record affirmatively shows that the conviction appeal was decided on non-federal grounds | 14 |
| A. The question whether defendant was denied due process of law under the Fourteenth Amendment by the admission into evidence of his confession was never raised at the trial or on the appeal of the conviction below and was not passed upon by the Supreme Court of New Jersey which rested its decision on non-federal grounds | 14 |

PAGE

B. The questions now raised pertaining to the trial Court's charge, the Prosecutor's summation, the admission into evidence of colored photographs, and the alleged inadequacy of trial counsel were never claimed to be a violation of the Federal Constitution, were never presented to or passed upon as such in the highest court of New Jersey, and in any event, present no federal question ..... 20

*Point Two*—Petitioner's confession was not extorted nor obtained by means fundamentally unfair, but was given voluntarily. Its admission into evidence was in accordance with the established law of this State, and in so holding the New Jersey Supreme Court decided no federal constitutional question of substance in a manner contrary to the decisions of this Court ..... 26

*Point Three*—The Court's ruling denying the request that defendant be present at the hearing of the motion for a new trial presents no federal question of substance, nor is it contrary to the decisions of this Court ..... 40

*Conclusion* ..... 45

## Cases Cited

Anonymous v. Baker, —— U. S. ——, 3 L. Ed. 2d 1234 (1959) ..... 37

Asheraft v. Tennessee, 322 U. S. 143 (1944) ..... 32

Ashdown v. Utah, 357 U. S. 426 (1958) ..... 37

Barber v. United States, 142 F. 2d 805 (4 Cir., 1944); cert. den., 322 U. S. 741 (1944) ..... 44

PAGE

Black v. Cutter Laboratories, 351 U. S. 292 (1956) ....12, 17

Brooks v. Missouri, 124 U. S. 394 (1888) .....12, 18

Brown v. Allen, 344 U. S. 443 (1953) ..... 38

Buchalter v. New York, 319 U. S. 427 (1942) ..... 24

Chessman v. Teets, 354 U. S. 156 (1957) .....42, 43

Cicenia v. Lagay, 357 U. S. 504 (1958) ..... 37

Council v. Clemmer, 177 F. 2d 22, 24 (C. A. D. C., 1949), cert. den., 338 U. S. 880 (1949) ..... 44

Crooker v. California, 357 U. S. 433 (1958) ..... 37

Durley v. Mayo, 351 U. S. 277 (1956) .....12, 17

Edelman v. California, 344 U. S. 357 (1953) .....12, 18

Edwards v. New York, 1 L. Ed. 17, 76 S. Ct. 1058 (1956) ..... 24

Frank v. Mangum, 237 U. S. 309 (1915) ..... 24

Gallegos v. Nebraska, 342 U. S. 55 (1951) ..... 38

Harding v. Illinois, 196 U. S. 78 (1904) .....12, 18

Hedgebeth v. North Carolina, 334 U. S. 806 (1948) ...12, 17

Hulbert v. Chicago, 202 U. S. 275 (1906) ..... 18

Jacobi v. Alabama, 187 U. S. 133 (1902) ..... 18

Joseph v. State, 236 Ind. 529, 141 N. E. 2d 109 (1957), cert. granted but limited to a different question, 355 U. S. 812 (1957) ..... 44

Kelley v. Oregon, 273 U. S. 589 (1927) ..... 18

Kipley v. Illinois, 170 U. S. 182 (1898) ..... 18

Lisenba v. California, 314 U. S. 219 (1941) .....24, 36

Loftus v. Illinois, 337 U. S. 935 (1949) .....12, 17

PAGE

Los Angeles Farming, etc. Co. v. Los Angeles, 217 U. S. 217 (1910) ..... 24

Lynch v. New York Ex Rel, Pierson, 293 U. S. 52 (1934) ..... 18

Lyons v. Oklahoma, 322 U. S. 596 (1943) ..... 36

Malinski v. New York, 324 U. S. 401 (1945) ..... 32

Mallett v. North Carolina, 181 U. S. 589 (1901) ..... 18

Michel v. Louisiana, 350 U. S. 91 (1955) ..... 19, 25

Missouri Pacific Railroad Co. v. Hanna, 266 U. S. 184 (1924) ..... 18

Mutual Life Ins. Co. v. McGrew, 188 U. S. 291 (1903) 18

New York Ex Rel Rosevale Realty Co. v. Kleinert, 268 U. S. 646 (1925) ..... 19

Roesel v. State, 62 N. J. L. 216 (E. & A., 1898) ..... 36

Selke v. State, 6 N. E. 2d 570, 211 Ind. 232 (Sup. Ct., 1937) ..... 44

Spies v. Illinois, 123 U. S. 131 (1887) ..... 12, 17, 18

Spano v. New York, —— U. S. ——, 3 L. Ed. 2d 1265 (1959) ..... 32, 33

State v. Bentley, 46 N. J. Super. 193 (App. Div., 1957) 44

State v. Bunk, 4 N. J. 461 (1952), cert. den., 340 U. S. 839 (1952) ..... 36, 38

State v. Cleveland, 6 N. J. 316 (1951) ..... 12, 20

State v. Cole, 136 N. J. L. 606 (E. & A., 1949), cert. den., 334 U. S. 851 (1949) ..... 36

State v. Donato, 106 N. J. L. 397 (E. & A., 1930) ..... 20

State v. Foulds, 127 N. J. L. 336 (E. & A., 1941) ..... 20

PAGE

State v. Grillo, 11 N. J. 173 (1952), cert. den. sub nomine, Grillo v. State of New Jersey, 345 U. S. 976 (1953) ..... 36

State v. Heathcoat, 119 N. J. L. 33 (E. & A., 1933) .... 21

State v. Huff, 14 N. J. 240 (1954) ..... 21

State v. Jefferson, 131 N. J. L. 70 (E. & A., 1943) .... 36

State v. Lustberg, 11 N. J. Misc. 51 (Sup. Ct., 1933) 20

State v. Meyers, 7 N. J. 465 (1951) ..... 21

State v. Monahan, 16 N. J. 83 (1954), cert. den., 348 U. S. 889 (1954) ..... 12, 20

State v. Murphy, 87 N. J. L. 515 (E. & A., 1915) ..... 36

Stein v. New York, 346 U. S. 156 (1953) ..... 24, 37, 38

State v. Wise, 19 N. J. 59 (1955) ..... 21

Stembridge v. Georgia, 343 U. S. 541 (1952) ..... 12, 17

Stroble v. California, 343 U. S. 181 (1952) ..... 38

Thomas v. Arizona, 356 U. S. 390 (1958) ..... 37

United States Ex Rel Mayo v. Burke, 93 F. Supp. 490 (D. C. Pa., 1950), aff'd, 185 F. 2d 405 (C. A. 3, 1950), cert. den., 341 U. S. 922 (1951), reh. den., 341 U. S. 943 (1951) ..... 18

United States v. Hayman, 342 U. S. 205 (1952) ..... 42

Watts v. Indiana, 338 U. S. 49 (1948) ..... 32

West v. Louisiana, 194 U. S. 258 (1904) ..... 24

Whitney v. California, 274 U. S. 357 (1926) ..... 18

Young v. Territory of Hawaii, 160 F. 2d 289 (C. C. A. 9, 1947), cert. den., 331 U. S. 849 (1947) ..... 24

PAGE

**United States Constitution Cited**

Sixth Amendment ..... 42

Fourteenth Amendment, Section 1 ..... 2fn, 12, 14, 17, 19, 20, 24, 27, 36

**Statutes Cited**

N.J.S. 2A:113-1 ..... 23

N.J.S. 2A:113-2 ..... 23

1948 Revision of the Judicial Code:

Sec. 2255 ..... 42

28 U.S.C.:

Sec. 1254(1) ..... 3

Sec. 1257(3) ..... 2

**Rules Cited**

Rules of the Supreme Court of the United States:

Rule 23(f) ..... 15

Rules of the Superior and County Courts:

Rule 3:2-3 ..... 38

**Texts Cited**

23 A.L.R. 2d 919 "Admissibility in Evidence of Unsigned Confession" ..... 20

23 C.J.S., "Criminal Law":

Secs. 974, 1504, pp. 307, 1325 ..... 44

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

### I

### Reference to Official Reports of Opinions Delivered in the Court Below*

The petitioner's reference to the opinions below is correct.

* Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief, refer to pages of the printed joint appendix record used on the appeal from the conviction below. Numbers preceded by the letters (MA) refer to pages of printed joint appendix record used on the appeal from the denial of the motion for a new trial below.

## II

## Counter-Statement Concerning Jurisdiction

Counsel for petitioner states (Petition, p. 1) without elaboration that jurisdiction is invoked and authorized by 28 U.S.C., Section 1254(1) and 28 U.S.C. 1257(3).

We respectfully submit that the decisions of the Supreme Court of New Jersey in this case involve no State statute repugnant to the Constitution of the United States; no title, right, privilege, or immunity was specially set up or claimed under the Constitution of the United States, nor did the said Court decide any federal question of substance not heretofore determined by this Court or contrary to the applicable decisions of this Court.

We further respectfully submit that the decisions below are in conformity with the provisions of the Federal Constitution[1] respecting due process and equal protection of the laws as guaranteed by the United States Constitution and represent no departure from the applicable decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction and issue a writ of certiorari to review the decisions of the Court below.

## Counter-Questions Presented

**A. As to the appeal of the conviction below.**

1. Whether the enlarged color photographs were properly verified and authenticated prior to their admission in evidence?

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[1] Constitution of the United States, Amendment XIV, Section 1.

2. Did the Court's charge to the jury accurately state the law or was it erroneous, resulting in manifest injury to the defendant in that:

(a) It improperly stated the law as to the length of time involved in deliberation and premeditation;

(b) It failed to properly inform the jury that lack of evidence might be taken into account in determining whether reasonable doubt existed as to defendant's guilt;

(c) Did not properly distinguish between first and second degree murder;

(d) Limited the jury's consideration of the element of "time of killing" to credibility and to the testimony of one of the State's witnesses only.

3. Was the polling of the juror improper and did it deny the defendant his right to an individual poll of each juror?

4. Was Exhibit S-84 erroneously admitted into evidence as a confession?

5. Was the jury's verdict the result of prejudice, passion or mistake and not founded upon proven facts?

6. Whether the foregoing questions raise issues reviewable by the United States Supreme Court?

**B. As to the appeal of the denial of motion for a new trial below.**

1. Whether there was an abuse of discretion in holding that the alleged newly discovered evidence failed to meet the test required to be met to entitle defendant to a new trial?

2. Is a motion for a new trial a trial within the meaning of State and Federal Constitutions requiring the presence of the defendant thereat?

## III

### Counter-Statement of the Case

The petitioner, Edgar Smith, was tried and convicted of murder in the first degree (977a-27 to 32). The mandatory sentence of death followed (988a-14 to 22) from which defendant appealed to the Supreme Court of New Jersey (1127a). Its opinion affirming the conviction below is reported in 27 N. J. 433 (1958).

The crime was the killing of Victoria Zielinski, a schoolgirl aged 15 years (27 N. J. 433, 436).

On March 4, 1957 at 7:30 p.m., in the company of her sister Myrna, the deceased, Victoria Zielinski, left her home to go to the home of her girl friend Barbara Nixon (196a-17). They walked down Wyckoff Avenue in the direction of Mahwah (196a-28 to 31). Myrna left the deceased about two houses before the Nixon home (196a-33) and walked back home, a distance of about one-half a mile (196a-40 to 197a-8).

It had been arranged that Myrna would leave the Zielinski home at 8:30 p.m. and that Vickie would leave the Nixon home simultaneously and meet at a halfway point (197a-35 to 38). Myrna became engrossed in her homework and left her home at 8:40, ten minutes late (197a-28 to 34). Myrna never met Vickie (197a-40). Myrna walked to the Nixon home arriving there about 8:50 p.m. (198a-9), stayed there about five minutes to ask about Vickie (198a-12) and then started home (198a-15). On the way home between 9:05 and 9:40 p.m. (198a-38) Myrna saw Don Hommell drive by in the direction of Ramsey at

a very fast speed (198a-18 to 34). No one was in the car with him (212a-37 to 40). Myrna arrived home at 9:10 p.m. and told her parents that she had not met Vickie (199a-5).

Mr. Anthony Zielinski was awakened by his wife a 12:30 a.m. that evening (236a-16). He got dressed and with his daughter Mary went to look for Vickie. They met some police on Wyckoff Avenue (238a-5) and then went to a milk bar in Ramsey (238a-18). They came home at 1:00 a.m. without success (238a-22). Later Mr. Zielinski with and without his wife, unsuccessfully searched for Vickie at the Nixon's (238a-30), on Wyckoff Avenue (238a-40) and at Pellington's on Route #17 (239a-15).

Mr. Zielinski continued his vigil until daybreak at which time he and his wife went again towards the Nixon home (239a-30). They saw the Nixons and asked if Vickie was there (239a-38). They returned to their home and then searched the various streets (240a-26 to 34). On Fardale Avenue Mr. Zielinski found his daughter's black loafer (240a-36). He stopped the car and from the window he saw a kerchief or bubushka about twenty feet further (241a-7 to 10). After sending his wife for the police, Mr. Zielinski went across the road over a wall and searched the brush (242a-25 to 29). When Mr. Zielinski returned they went across Chapel Road to the sand pit (242a-32) where Mr. Zielinski discovered a pair of red gloves (242a-35). He returned to the car in time to meet the police (243a-38). With the police, they searched both sides of the road and into the sand pit (244a-10). There Mr. Zielinski saw stones covered with blood (244a-24) and on the top of the mound a shoe, locket and brains scattered seven or eight feet along the bank (244a-37 to 245a-8). He looked over the bank and saw his daughter's body in a jack-knifed position (245a-9). Her sweater was pulled over her shoulders, one stocking was off, there was a hole

in the back of her head (245a-18 to 26) and the brassiere was off, hanging down exposing her breast (232a-28 to 40).

Subsequent examination disclosed that there were teeth bites around the deceased's right nipple in the areola area (511a-33 to 38).

Thereafter, Joseph Gilroy, aroused by suspicious stains on the seat and floor of his car, which he had loaned to the defendant, reported this fact to the police (383a-10 to 35; 418a-23 to 32).

Detective Graber, with other officers, went to Ridgewood were they picked up the defendant at his mother-in-law's home (419a-33 to 420a-4).

Smith was taken to the Mahwah Police Headquarters (420a-15) and interrogated. After interrogation, Smith went with Detective Graber and others to Mechanic Street in Ramsey where he showed them a garbage can (1060a) in which he had thrown away his shoes (420a-24 to 29). The shoes (Exh. S-72, 422a-32) were an exact duplicate (605a-28) of the plaster cast impression (Exh. S-75, 469a-36) made at the scene of the crime (469a-24 to 30). The shoes were found to be stained with blood of human origin (601a-8 to 20).

Later, the defendant Smith was taken to the gravel pit where he claimed he had been sick and thrown up (422a-37 to 423a-7). A search disclosed no evidence of defendant having thrown up (423a-7 to 10). In addition to searching this area, the detectives, with the defendant, searched an area along Pulis Avenue where defendant said he had thrown his pants (424a-23 to 40) and along Wyckoff Avenue where defendant claimed he had first thrown up (425a-13 to 17) without success (424a-29; 425a-18 to 20).

Subsequently, the defendant was taken to the Prosecutor's Office where he was further interrogated by Detective DeLisle (519a-10). During the course of the questioning, Smith broke out crying (519a-20 to 25). He was given a cigarette and water (519a-27). He asked to see a certain priest (519a-29) and after regaining his composure, he related of his meeting with the deceased, Vickie, and of some of the occurrences at the pit (519a-30 to 520a-4).

After he had seen the priest, the defendant gave a statement under oath (527a-29 to 35) in the presence of the police authorities and a member of the jury panel (517a-28 to 518a-13; 543a-26 to 544a-30).

The statement (Exh. S-84, 1072a to 1111a) was taken at the Prosecutor's Office (531a-8) by Arthur J. Ehrenbeck, an official stenographic reporter on March 6, 1957 (530a-34 to 40) and continued while going to and at the scene of the crime (531a-25 to 30). It was given by the defendant voluntarily without threat, promise or violence (532a-4 to 10; 544a-10 to 35) in the presence of several officers (531a-15 to 20) and a juror (543a-26) after defendant had consulted with his priest (485a-13 to 20). In fact, defendant's counsel admitted that it was voluntary (532a-30 to 35) although the Court permitted him thereafter to present testimony as to the question of voluntariness since the stipulation was made prior to reading the statement (537a-37 to 538a-40).

After some preliminary questions pertaining to name and address (1072a-40) and introductions (1073a-6 to 15) the defendant was advised that he was going to be asked "some questions" "concerning an incident that occurred in Mahwah and one Vickie Zielinski" (1073a-16). He stated that he was willing to give a voluntary statement concerning the incident, under oath (1073a-18 to

21). He proceeded to describe the incidents of the morning in question; how he went bowling (1074a-34); that he borrowed Gilroy's Mercury (1075a-31 to 40); bought some kerosene (1076a-13) and went home to light the heater (1076a-16 to 19).

He described how he met his wife and mother-in-law at his trailer (1076a-24 to 28) and that he then went to Segor's in Ramsey to get some more kerosene around 8:20 or 8:30 p.m. (1076a-26 to 33). After getting the kerosene he started back by way of Wyckoff Avenue (1076a-37 to 40) and met Vickie Zielinski whom he recognized (1077a-4 to 8). She waved (1077a-10), defendant stopped, turned around and picked her up at about 8:40 (1077a-12 to 22). Defendant proceeded in the direction of Vickie's home, but at her suggestion started to go around the block (1077a-23 to 35). When he reached the sandpit, however, he pulled into it (1077a-35 to 1078a-4) of his own accord (1103a-8). There a discussion ensued about Vickie having cut school (1078a-7 to 16). Vickie said she was going to get out and walk home (1078a-17); that she was going to tell her father (1078a-18; 1094a-20 to 24); that she was going to tell her father that he (Smith) was like the rest of the boys (1078a-20; 1094a-21 to 27; 1097a-26). As Vickie started to get out of the car, defendant grabbed her arm or jacket (1078a-25 to 28; 1094a-36). Defendant was off balance (1078a-36 to 1079a-4; 1095a-4) and Vickie was able to pull herself out of the car, pulling defendant with her (1079a-4; 1095a-4 to 10). She started swinging at defendant and slapping (1079a-9; 1095a-16; 1097a-40). Defendant let go of her hand and swung his right hand in her direction (1079a-12); he "swung hard" —"as hard as he could" (1098a-4 to 8). He didn't know whether he struck her more than once (1095a-24) nor did he know if he struck her with an article other than his fist (1092a-25). His hand, however, didn't hurt (1079a-

15; 1098a-9). He remembered running (1079a-24); running or chasing somebody (1091a-38); he remembers running possibly down the road (1104a-6), Fardale Road (1103a-14). He got back in the car alone (1079a-40). He knew that Vickie wasn't with him, he was alone, but it seemed natural (1105a-4 to 10). By the time he got into the car he had "completely forgotten about the whole thing. It wasn't in (his) mind at all. Just like it never happened" (1082a-28 to 30). He started to back the car out, he couldn't see where he was going (1080a-6). He headed south on Chapel Road and stopped (1080a-4 to 7). He had Vickie's books and pocketbook when he left the sandpit and his recollection was that he probably threw them away when he stopped (1080a-25 to 33). He realized he had only one shoe on when he got to his home (1080a-39) and that his pants, which he took off, had blood all over them (1080a-40). After changing, he picked up the bloody pants and got back into the car, taking a twelve volt lantern with him (1081a-25 to 33). He drove down Chapel Road back to the sandpit (1081a-32), parked the car and walked into the sandpit with the lantern (1082a-4 to 6). At the end of the road he found his shoe which he picked up (1082a-7). He saw a red glove or mitten there, but he just kicked it (1082a-10). He then proceeded to Gilroy's home and between Chapel Road and Gilroy's, he threw his pants out (1082a-13 to 19).

The next morning he heard a news broadcast which reported that a girl, Victoria Zielinski had been killed in Mahwah the previous night (1083a-26 to 38). He got curious, something was snapping in the back of his head and he didn't know what it was that he should recall (1083a-40 to 1084a-5). He listened to the twelve o'clock news and heard the bulletin (1084a-11). Then the defendant related what occurred when he called Gilroy (1084a-19):

"* * * I asked him if he had heard anything on the radio and he said no. I remember the exact words I used.

"I said, 'Some broad from Ramsey got killed.'

"I said, 'It sounds like Vickie but, I don't know, the name on the radio didn't sound right.'

"He said something like, 'To hell with it. I will be down later' something like that.

I went back in. *That's when it dawned on me that I had been with her the night before and something snapped in the back of my head that I did it and I knew it in back of my head.* I couldn't convince myself." (Italics supplied.)

Defendant related later that Gilroy and another fellow—Don Hommell, came to pick him up (1085a-10) and that (1085a-13).

"First thing I said when I come out of the house, I said to this fellow Don, I said 'Was that Vickie that got killed?' *I guess I was actually asking as if I didn't know myself*, and he said, 'Yeah.'

He said, 'The place up there is swarming with cops and checking the registration of every Mercury registered in Bergen County.'

*That's when it hit me really hard I must have been the one who really did it.*" (Italics supplied.)

Defendant then related that he threw away his shoes in a convenient garbage can (1085a-27) and that that evening he was picked up by the police (1086a-17).

At the scene of the crime, the defendant pointed out the spot on Wyckoff Avenue where he picked up Vickie Zielin-

ski (427a-7 to 20); he described what had happened (428a-24 to 33); his running around and his leaving the gravel pit (428a-34 to 38). He directed the police to a point south on Chapel Road where he told them to stop (428a-40 to 429a-5). In the field across the road were found the pocketbook and school books of the victim (429a-8 to 11; Exh. S-74, 1064a).

The defendant's pants (Exh. S-78, 505a-31) were found on Oak Street (502a-20; Exh. S-80, 1066a). In the pockets thereof was found a pair of socks (505a-34 to 40; Exh. S-79, 506a-6). Both the pants and socks were stained with human blood type "O" (602a-16 to 21), the same blood type as was found on the victim's sweater (602a-20), jacket (602a-30), bra (603a-33 to 40), gloves (604a-4 to 13), and scarf (606a-24 to 30).

Subsequently, a baseball bat (Exh. S-69, 385a-25) which had been in the back of the car of Gilroy (385a-20) was found fifty feet east of Chapel Road and 106 feet south of Fardale Avenue (406a-14 to 41). It, likewise, was ingrained with blood (605a-33 to 39).

After the appeal of his conviction was affirmed by the Supreme Court of New Jersey, 27 N. J. 433 (1958), Smith petitioned the trial court for a new trial on the grounds of alleged newly discovered evidence. Appeal to the Supreme Court of New Jersey followed the denial of the motion, resulting in an affirmance by the Supreme Court of New Jersey, 29 N. J. 561 (1959).

The petition for writ of certiorari to this Court followed a stay of the sentence of death by Mr. Justice WILLIAM J. BRENNAN for this Court on June 19, 1959.

## IV.

## Summary of the Argument

We respectfully submit:

FIRST: No federal question was ever raised or presented for decision to the Supreme Court of New Jersey on the conviction appeal, but on the contrary, the record affirmatively shows that the appeal was decided on non-federal grounds.

(a) The question whether defendant was denied due process of law under the Fourteenth Amendment not having been raised at the trial or on the appeal, and not having been passed upon by the New Jersey Supreme Court, this Court should not entertain jurisdiction to review the case. *Hedgebeth* v. *North Carolina*, 334 U. S. 806, 807 (1948); *Loftus* v. *Illinois*, 337 U. S. 935 (1949); *Stembridge* v. *Georgia*, 343 U. S. 541, 457 (1952); *Durley* v. *Mayo*, 351 U. S. 277, 281 (1956); *Black* v. *Cutter Laboratories*, 351 U. S. 292 (1956).

It does not appear on the record that any title, right, privilege, or immunity was specially set up or claimed at the proper time in the proper way so as to require this Court to entertain jurisdiction to review the State Court decision. *Spies* v. *Illinois*, 123 U. S. 131, 181 (1887); *Brooks* v. *Missouri*, 124 U. S. 394 (1888); *Harding* v. *Illinois*, 196 U. S. 78 (1904); *Edelman* v. *California*, 344 U. S. 357 (1953), but rather does it appear that the decision rests on well settled non-federal grounds in conformity with the State Court decisions. *State* v. *Cleveland*, 6 N. J. 316 (1951); *State* v. *Monahan*, 16 N. J. 83 (1954), cert. den. 348 U. S. 889 (1954).

(b) The questions now raised pertaining to the trial Court's charge, the prosecutor's summation, the admission into evidence of colored photographs, and the alleged inadequacy of trial counsel were never claimed to be in violation of the Federal Constitution, nor were they so presented or passed upon as such by the highest Court of New Jersey, and in any event, they present no federal question.

SECOND: The undisputed facts contained in the record establish beyond question that the confession admitted into evidence was given voluntarily without threats, promises, or physical or mental coercion, and in accord with the fundamental fairness required by the Fourteenth Amendment. Its admission into evidence was in accord with the law of New Jersey and in so deciding, the New Jersey Supreme Court decided no federal question.

THIRD: The ruling of the trial Court and the affirmance thereof by the Supreme Court of New Jersey on the appeal from the denial of a new trial presents no federal question, nor is the holding that petitioner's presence was not required at the hearing of the motion for a new trial in violation of the Federal Constitution, especially where petitioner made no request to appear, was represented by counsel, and it appeared conclusively that petitioner had no pertinent information to present which could in any way have affected the result.

## Preliminary Statement

In view of the fact that petitioner has lumped together in his questions presented for review those which allegedly arose on the appeal of the conviction (1 to 9) which we

contend were neither raised, presented or passed upon by the Supreme Court of New Jersey, with those which allegedly arose on the motion for a new trial (10 to 11), we discuss Points I to IV separately from Point V.

## V

## The Argument

### POINT ONE

**No federal question was ever raised or presented for decision to the Supreme Court of New Jersey on the appeal of the conviction below, but on the contrary, the record affirmatively shows that the conviction appeal was decided on non-federal grounds.**

**A. The question whether defendant was denied due process of law under the Fourteenth Amendment by the admission into evidence of his confession was never raised at the trial or on the appeal of the conviction below and was not passed upon by the Supreme Court of New Jersey which rested its decision on non-federal grounds.**

The petitioner urges as a ground for review (Point I, Petition, pp. 13 to 48) an alleged denial of due process under the Fourteenth Amendment of the United States Constitution in the admission into evidence of the confession of Edgar Smith.

The basis of such contention is grounded in the alleged improper:

1. Taking of the statement while held incommunicado for upwards of twenty (20) hours through a freezing cold night;

2. Around-the-clock prolonged and massive inquisition by dozens of officials without counsel, no sleep, no rest, little food, and scant clothing;

3. Lack of advice as to his constitutional right to remain silent and right to counsel;

4. Failure to arraign; and

5. Trickery and cajolery in attempting to get petitioner to sign the confession by a stealthily unauthorized visit to his prison cell.

Aside from the fact that every one of these contentions is completely without support in the record (as we show below), it is significant that nowhere does petitioner point out that the same was raised at the trial, on the appeal, or presented to the New Jersey Supreme Court for decision and passed upon by said Court (Rule 23(f) of Rules of the Supreme Court of the United States).

Studiously petitioner has avoided any reference to this essential element to the jurisdiction of this Court and for a good reason. The record affirmatively shows that none of these questions were raised either in the trial or appellate courts and of necessity therefore they were never presented for decision to the Supreme Court of New Jersey.

Thus, at the trial when the confession was first offered (532a-20) the following colloquy took place (532a-31):

"Mr. Calissi: Is there any doubt in Mr. Selser's mind that this statement was not given voluntarily?

Mr. Selser: No, there is no doubt in my mind at all, and I am sure it is an accurate transcript because I know the stenographic reporter and I know his skills."

After counsel for petitioner was given an opportunity to read the statement and a recess taken to the following day

for that purpose (533a-10), the objection to the statement was not grounded in any Federal Constitutional grounds of lack of due process or on its being extracted by physical or mental coercion, threats or promises without counsel, inordinate delay in arraignment, massive interrogation without sleep or food, or trickery as here claimed, but rather on the sole ground that under State law the statement as such was not a confession and therefore not evidential (534a-7). Counsel for defendant reiterated, "I do not deny the statement" (535a-27) and declared that in any event, he would like to call Smith with regard to the statement for the purpose of testifying with regard to the circumstances preceding the taking of the statement up to the time of its taking (537a-27).

The Court permitted counsel to present testimony as to voluntariness of the confession by reopening that issue despite the stipulation that it was voluntary (538a-33 to 39) and Smith testified as to the circumstances of the taking of the statement.

After such testimony by Smith (his testimony is illuminating since even he did not contend that threats, promises or coercion, physical or mental, was exerted upon him, or that request for counsel was denied or that he was held incommunicado (539a to 542a)) counsel made no objection as to voluntariness of the confession, insisting only that the statement was not a confession. The Court found the confession to be voluntary (545a).

On appeal to the Supreme Court of New Jersey, 27 N. J. 433 (1958) the court pointed out, at page 457:

> "The admission of this exhibit was originally objected to by defendant upon the ground that it was not a confession and therefore the writing itself, as opposed to verbal reports of Smith's statements to the police, was not admissible in evidence. This theory is

not advanced in the brief presently before us. *The only argument asserted now is that before he made the confession Smith had never been told of the nature of the injuries from which the victim died and that for this reason the inferences drawn from the confession are unjustified.* * * *" (Italics supplied)

More importantly, the Supreme Court of New Jersey pointed out, at page 459:

"Concededly it was voluntary, although the defendant at the trial said he had given untruthful answers."

From the above, it is plainly manifest that violation of the due process clause of the Fourteenth Amendment of the United States Constitution in the taking of the confession was never contended for or raised in the trial or appellate courts of New Jersey, never presented for decision to the highest court of the State, nor passed upon or necessary to its decision which rested solely upon independent non-federal grounds.

Under the circumstances here presented, the law is clear that the Supreme Court of the United States will not review a decision of a State court unless it affirmatively appears from the record that the federal question was presented to the highest court of the State and that its decision of the federal question was necessary to its determination of the cause. *Hedgebeth* v. *North Carolina*, 334 U. S. 806, 807 (1948); *Loftus* v. *Illinois*, 337 U. S. 935 (1949); *Stembridge* v. *Georgia*, 343 U. S. 541, 547 (1952); *Durley* v. *Mayo*, 351 U. S. 277, 281 (1956); *Black* v. *Cutter Laboratories*, 351 U. S. 292 (1956).

It must appear on the record that such title, right, privilege, or immunity was "specially set up or claimed" at the proper time in the proper way before jurisdiction to review the State court decision will be entertained. *Spies*

v. *Illinois*, 123 U. S. 131, 181 (1887); *Brooks* v. *Missouri*, 124 U. S. 394 (1888); *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291 (1903); *Kipley* v. *Illinois*, 170 U. S. 182 (1898); *Harding* v. *Illinois*, 196 U. S. 78 (1904); *Mallett* v. *North Carolina*, 181 U. S. 589 (1901); *Jacobi* v. *Alabama*, 187 U. S. 133 (1902); *Hulbert* v. *Chicago*, 202 U. S. 275 (1906); *Missouri Pacific Railroad Co.* v. *Hanna*, 266 U. S. 184 (1924); *Kelley* v. *Oregon*, 273 U. S. 589 (1927); *Whitney* v. *California*, 274 U. S. 357, 360-61 (1926); *Lynch* v. *New York Ex Rel. Pierson*, 293 U. S. 52 (1934); *Edelman* v. *California*, 344 U. S. 357 (1953); *United States Ex Rel Mayo* v. *Burke*, 93 F. Supp. 490 (D. C. Pa. 1950), affirmed 185 F. 2d 405 (C. A. 3, 1950), cert. den. 341 U. S. 922 (1951), reh. den. 341 U. S. 943 (1951).

Thus, in *Spies* v. *Illinois*, *supra*, 123 U. S. 131, 181 the Court pointed out:

> "To give us jurisdiction * * * because of a denial by the State court, of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was 'specially set up or claimed' at the proper time in the proper way. * * *. As the supreme court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more."

Applying that rule to this case, we find that at the trial no title, right, privilege or immunity was specially set up or claimed under the Constitution, laws, or treaties of the United States. Thus, when the testimony of McCullough was offered, the admission of which is now assigned for error, the objection made

was not that its admission would be a violation of any provision of the Constitution or laws of the United States, but because it was 'incompetent and irrelevant,' coming as it did from a man who, by his conduct in procuring the statements from the defendant as to which it was proposed he should testify, had shown himself to be unworthy of belief in a court of justice, and because 'The witness has shown that he held out an inducement, a promise, to the defendant for his statement, which renders it incompetent.'"

The Court concluded (31 L. ed., p. 457):

"These are all the assignments of error which relate to the rulings in the progress of the trial, and they fail entirely to present any questions of federal law for our consideration. So far as appears, the trial court in its decision was governed exclusively by the Constitution and laws of the State; and the Supreme Court in its opinion on this part of the case, which is in the record, makes no mention whatever of any claim of right under the Constitution or laws of the United States."

Nor may petitioner raise these questions for the first time in this Court, since the same would not be properly in issue here. *Michel v. Louisiana*, 350 U. S. 91, 101 (1955); *New York Ex Rel Rosevale Realty Co. v. Kleinert*, 268 U. S. 646 (1925).

What we have said above with reference to the confession is similarly applicable to the contention of petitioner that the prosecutor furtively and unlawfully visited petitioner in jail to gain an acknowledgment of the confession (Petition, pp. 44-46). At no time was it contended by petitioner that he was deprived of due process of law in violation of the Fourteenth Amendment to the Federal

Constitution. As previously pointed out, *supra*, his sole contention was that the statement was not an acknowledgment of guilt, and thus not admissible as a confession.

Aside from the above, the trial court's determination that the confession was admissible because it had been read over by petitioner and admitted to be correct, was in accordance with the established law in this State and was not a decision of a federal constitutional question.

The law in New Jersey, long established, is that a statement made by a defendant need not be signed by him to render the same admissible. All that is required is that the statement be read over to or by the accused and that it be signed or otherwise admitted by him to be correct. *State* v. *Donato*, 106 N. J. L. 397 (E. & A. 1930); *State* v. *Lustberg*, 11 N. J. Misc. 51 (Sup. Ct. 1933); *State* v. *Foulds*, 127 N. J. L. 336 (E. & A. 1941); *State* v. *Cleveland*, 6 N. J. 316 (1951); *State* v. *Monahan*, 16 N. J. 83 (1954), cert. den. 348 U. S. 889 (1954); 23 *A.L.R.* 2d 919 "Admissibility in Evidence of Unsigned Confession".

That the Supreme Court of New Jersey rested its decision upon this non-federal independent ground is without question. 27 N. J. 433, 458-459 (1958).

**B. The questions now raised pertaining to the trial Court's charge, the Prosecutor's summation, the admission into evidence of colored photographs, and the alleged inadequacy of trial counsel were never claimed to be a violation of the Federal Constitution, were never presented to or passed upon as such in the highest court of New Jersey, and in any event, present no federal question.**

The petitioner now urges that he was denied a fair and impartial trial in violation of the Fourteenth Amendment to the United States Constitution (Petition II, pp. 48-63)

and that he had inadequate defense representation and presentation (Petition III, pp. 53-59).

One sufficient answer to these contentions lies in the fact that at no time did petitioner claim either in the trial court or on appeal that he was deprived of his Federal Constitutional rights. (See cases cited under Point One, Part A.) In fact, the Supreme Court rested its decision wholly and completely upon State, non-federal grounds.

Thus, as to the admission into evidence of the colored photographs, objected to by petitioner at the trial solely upon the ground that they had not been properly authenticated (318a-16 to 20; 319a-27 to 37), the Supreme Court of New Jersey on appeal (27 N. J. 433 (1958)) pointed out that the record conclusively established a proper foundation justifying their admission into evidence and that enlargements as well as colored photographs are admissible in the discretion of the trial court. The court held, consistently with its prior decisions on this issue (*State* v. *Wise*, 19 N. J. 59 (1955); *State* v. *Huff*, 14 N. J. 240 (1954); *State* v. *Meyers*, 7 N. J. 465 (1951); *State* v. *Heathcoat*, 119 N. J. L. 33 (E. & A. 1933)) that the logical relevance of the exhibits was not overwhelmed by their inherently prejudicial qualities so as to impair defendant's right to a fair and impartial trial. 27 N. J. 433, 448-449 (1958).

That this determination was on non-federal grounds cannot be questioned. That no federal claim was made or presented to the New Jersey Supreme Court is also without question.

Similarly, as to the judge's charge, we point out that at no time did counsel for petitioner object to the use of the words now urged as a "vicious and brutual summary of prejudice and hostility imaginable" (Petition, p. 48). See exceptions to charge (969a to 975a). In fact, the very words used by the Court as is clearly demonstrated by a

reading of the record and the opinion of the Supreme Court of New Jersey, were used by the witnesses in describing what they saw and found. In such a brutal murder where the autopsical examination revealed (27 N. J. 433 (1958) at p. 438):

> "* * * the cause of death as 'the total crushing of the skull with a decerebration, traumatic.' Victoria's brain and left eye were completely destroyed. Her teeth were hanging loosely in her mouth and her nose and jaw had sustained multiple fractures. Both her hands were covered with blood, and her fingernails were ripped. * * *."

could any charge using the facts of the case avoid the use of the complained of words? Obviously not. In any event, this portion of the charge was never presented to the New Jersey Supreme Court either as a federal or non-federal question. 27 N. J. 433 (1958).

What has been said as to the words used by the Court is equally applicable to the claim of petitioner that the jury retired with "prejudicial and inflammatory words of the prosecutor and the judge concerning a 'sex murder' ringing in their ears" (Petition, pp. 49-51).

In fact, as disclosed by the record, the only exception to the charge in this respect was taken by the State (975a-36 to 976a-32). How petitioner can blatantly declare "The said Trial Judge, in his charge strongly supported the theory of the People's case as a '*sex-killing*'" (Petition, p. 49) in the face of the Court's declaration that the case was sent to the jury "solely on an act the consequences of which may be bloodshed" (976a-30) as quoted by petitioner (Petition, pp. 50-51), is beyond comprehension. The only conclusion to be drawn from petitioner's claim is that he is suffering from a falsification of the retrospect.

In any event, a reading of the opinion of the Supreme Court of New Jersey demonstrates conclusively that this non-federal claim was never presented or passed upon by it.

As to the failure to submit manslaughter to the jury as contended by petitioner (Petition, p. 51), we point out that had counsel for petitioner read the indictment (1a) or the charge of the Court (948a to 949a), he could easily have discovered that the crime charged was murder in violation of New Jersey statutes 2A:113-1 and 2A:113-2, and not the common law crime. Aside from the fact that petitioner never requested such a charge (980a to 984a) and never excepted to the charge on this ground, the same was never claimed to be a federal deprivation, nor was it ever presented or passed upon by the Supreme Court of New Jersey. 27 N. J. 433 (1958).

Petitioner also urges that the death certificate, "although in the prosecutor's possession" "fixing the 'time of death' at about '10 to 11 P.M.' was never introduced" (Petition, p. 52). One simple answer lies in the fact that its maker, Dr. Gilady, was present and testified at the trial (509a to 516a). How, therefore, could the State, within the rules of evidence, have introduced the death certificate. But more than this, the claim now presented as well as the claims of prejudice arising out of the prosecutor's summation, the introduction of the two blood-smeared rocks, and the claimed withholding of Hommel's clothing were never objected to, claimed as a Federal Constitutional deprivation, or presented and passed upon by the Supreme Court of New Jersey. 27 N. J. 433 (1958).

To conclude, we point out that in any event, every claim of error presented to the New Jersey Supreme Court was of a non-federal nature and was decided on State law.

That the present claims (even though we pass for the moment the insurmountable hurdle that they were never presented to or passed upon by the New Jersey Supreme Court) present no federal question, has long been set at rest.

The States are free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate. The Fourteenth Amendment does not permit a party to bring to test in the United States Supreme Court every ruling made in the course of a trial in the State Court, nor does it enable this Court to review errors of State law however material under the law. *Buchalter* v. *New York*, 319 U. S. 427, 429, 431 (1942).

See also *Los Angeles Farming, etc. Co.* v. *Los Angeles*, 217 U. S. 217 (1910); *West* v. *Louisiana*, 194 U. S. 258 (1904); *Frank* v. *Mangum*, 237 U. S. 309, 326 (1915); *Young* v. *Territory of Hawaii*, 160 F. 2d 289 (C. C. A. 9, 1947), cert. den. 331 U. S. 849 (1947); *Lisenba* v. *California*, 314 U. S. 219, 228, 236 (1941); *Stein* v. *New York*, 346 U. S. 156 (1953); *Edwards* v. *New York*, 1 L. ed. 17, 76 S. Ct. 1058 (1956).

In the last cited case (*Edwards* v. *New York*) *supra*, the defendant applied for a stay of execution of death warrant, urging deprivation of due process by reason of (1) trial judge's remarks as to jury verdict being subject to review if convicted; (2) newspaper publicity relating to jury's inspection of murder scene; (3) alleged bias of trial judge; (4) alleged perjury of the Prosecutor's principal witness; (5) alleged inadequate corroboration of accomplice testimony under State law; and (6) alleged erroneous instructions by trial court.

In denying the stay, it was concluded that the questions raised no substantive federal question or even sufficiently debatable to lead to the belief that at least four members

of the court would vote to grant certiorari. It was also pointed out that these contentions only involved matters of State law and raised no federal questions.

We submit that in truth and in fact, the claims here made purporting to raise questions under the Constitution of the United States are frivolous.

Petitioner also makes the claim that his trial attorney inadequately represented him at the trial to his prejudice (Petition, Point III, pp. 53-59). He grounds his contention in various claims of serious errors and failures of defense (Petition, p. 53).

We submit that one complete answer to these charges is that at no time did petitioner claim that he was inadequately represented. The trial attorney, Mr. Selser, was the attorney of his choice and was eminently qualified by his years of practice and experience in criminal law both as a practitioner and former Assistant Prosecutor.

It is also significant that after the trial in which these alleged errors were committed, the same Mr. Selser was retained to take the appeal to the Supreme Court of New Jersey, 27 N. J. 433 (1958), assisted in the motion for a new trial (MA12a), and presented the appeal thereon, 29 N. J. 561 (1959).

Nor was this question ever presented, claimed as a deprivation of a federal right, or passed upon by the New Jersey Supreme Court.

In *Michel* v. *Louisiana*, 350 U. S. 91 (1953) even where petitioner had raised the question unsuccessfully in the State court and claimed, among other things, that he was denied effective representation by his appointed counsel, the Court refused to infer lack of effective counsel from the mere circumstance that a timely motion to quash was not filed in time. How more so here where after utilizing

the services of Mr. Selser through trial and two successive appeals we hear, for the first time, the claim of lack of effective counsel.

## POINT TWO

**Petitioner's confession was not extorted nor obtained by means fundamentally unfair, but was given voluntarily. Its admission into evidence was in accordance with the established law of this State, and in so holding the New Jersey Supreme Court decided no federal constitutional question of substance in a manner contrary to the decisions of this Court.**

We have pointed out in our Point One that the question whether defendant was denied due process of law under the Fourteenth Amendment by the admission into evidence of his confession was never raised at the trial or on appeal and was not passed upon by the Supreme Court of New Jersey.

That barrier alone standing in the way of petitioner's claims now raised for the first time should suffice to result in a denial of the writ of certiorari. However, since petitioner has sought to impose upon this Court by stating as facts those things which a simple reading of the record would disclose to be false, and to thus present to this Court a picture of Constitutional deprivation, we are forced to expose these falsehoods to the Court.

Significantly, the statement of petitioner contained in his Reasons for Granting Petition for Writ of Certiorari proclaims, "assuming the questions to be the said facts" (Petition, p. 12).

The difficulty with this assumption is that the record cannot offer any basis for such an assumption.

The uncontradicted facts as established by the record herein show the following:

Acting on information supplied by Joseph Gilroy, a friend of Smith who had loaned his car to petitioner and had become suspicious of stains found in his car (383a-10 to 35; 418a-23 to 32), Detective Graber, accompanied by Investigator Garabedian and Gilroy (496a-4), picked petitioner up at his mother-in-law's home in Ridgewood (419a-34) on March 5, 1957 at 11:30 p.m.

Smith, who had retired at about 10:00 p.m. that evening (669a), arose and accompanied the officers to Mahwah police headquarters (420a).

On arrival at the Mahwah police station, there were present Mr. Galda, Assistant Prosecutor, Chief Smith of Mahwah, Captain DeMarco, and numerous newspaper reporters (420a).

Galda questioned Smith generally at around midnight (475a, 496a-30.) During the conversation with Smith, Detective DeMarco noticed that Smith's hand was lacerated (476a). Smith told Galda that he had fallen out of the car when he had become ill (477a). Examination of Smith's knees disclosed contusions and lacerations (476a) and further questioning disclosed that Smith had thrown away his pants (477a) and a pair of shoes (477a-15). As a result of these disclosures Galda, Detectives Graber and DeMarco, and Lieutenant Haight went with petitioner Smith to Ramsey where Smith pointed out where he had thrown away his shoes in a garbage can (420a-25; 477a-20 to 30). The police continued from there to Chapel Road in an effort to corroborate Smith's story and searched an area of the gravel pit for evidence that Smith had thrown up as related to them by Smith (423a; 478a). The police had a large light (423a) and a car was parked with its lights on the area (478a); yet, the search disclosed noth-

ing (423a; 478a). From the gravel pit the officers and Smith went to his trailer to obtain clothes which petitioner stated he had worn (423a-30). While looking for the jacket Smith informed them that it was at his mother-in-law's house in Ridgewood (423a-37). They continued to Pulis Avenue where Smith said he had thrown away his pants after he had been sick (424a-23 to 37; 480a-10 to 21) and searched at about 3:00 a.m. (434a-14) without success. On the way back to Mahwah they searched Wyckoff Avenue where Smith said he had first been sick, without success (425a-13 to 20).

Subsequently, they all returned to Mahwah police headquarters and soon thereafter at about 3:30 a.m. Graber and Garabedian went back to Ridgewood and picked up the blue jacket previously referred to (425a-25; 496a-36).

At police headquarters a discussion was had as to the possibility of looking for the pants again (480a). While this discussion was taking place Smith was seated in the back of the Magistrate's Court with Gilroy and others who were being questioned (481a-30; 482a-16).

DeMarco told Smith that Smith was going with the officers to search for the place where he allegedly had vomited at the church on Wyckoff Avenue (481a). Before Smith left with Captain Wickham, Sinatra, O'Har, and Garabedian (280a-30; 497a-15) to search this area again, one of the officers went out and brought back some coffee and buns for everyone, including the police, petitioner Smith, and some of the other fellows also being questioned (482a-12 to 17).

The officers left again between 3:00 a.m. and 3:45 a.m. with Smith to find the place where Smith had vomited (497a-15). The petitioner assisted in the search, got out of the car and pointed out where he allegedly had thrown up (280a to 281a; 497a-20 to 28), again without success. Smith

then directed the officers to Pulis Avenue where again a diligent search was made for the pants allegedly thrown away because they had been vomited on (281a-14 to 20; 497a-40 to 498a-10) still without success.

From there the police returned to police headquarters, arriving there quite late (498a-34).

Thereafter, at about 5:00 a.m. arrangements were made to have Smith examined with respect to his injuries to his knees (482a-18). Dr. Gilady was contacted and the examination set for 7:30-8:00 a.m. (482a-24). Sinatra and DeMarco went with Smith in one car while the balance of the officers left for the Prosecutor's Office or their respective police headquarters (482a-20 to 30).

On the way down from Ramsey DeMarco, Sinatra and petitioner Smith stopped at DeMarco's home (482a-32; 541a-31). DeMarco gave Sinatra money to have breakfast with Smith and to return when they were finished so that they could go to Dr. Gilady's office (482a-35). Sinatra went with Smith to have breakfast (482a-38; 542a-9), returned and picked up DeMarco and drove to Dr. Gilady's office (482a-40) where petitioner was examined (483a-5) at about 7:55 a.m. (510a-12).

After the examination by Dr. Gilady, they returned to the Prosecutor's Office (483a-38) where a photographer was called to take pictures of Smith's knees (484a-6). After the pictures were taken Detectives Spahr and DeLisle spoke with Smith at about 10:00 a.m. (485a-7; 519a-9; 522a) with respect to his activities on the night in question (519a-23). During the questioning Smith broke out crying. He asked for a drink of water and a cigarette, both of which were given to him (519a-20 to 27). Smith requested permission to speak to a certain priest that he knew at Don Bosco High School (519a-28; 751a-21). The priest was called (485a-14).

Prior to the arrival of the priest and after regaining his composure, Smith related of his meeting with the deceased, Vickie, and of some of the occurrences at the pit (519a-30 to 520a-4). When the priest arrived about 45 minutes to an hour later (520a-6 to 10) Smith was closeted with him for a considerable length of time, approximately a half hour (751a-25 to 35) after which he gave the Prosecutor the confession (485a-19; 527a-32; 751a-40) in evidence (551a-14; Exh. S-84, 1072a).

The statement was given stenographically at the Prosecutor's Office (531a-23) under oath (527a-29 to 35) in the presence of a disinterested spectator (a member of the then current trial jury panel, not one who sat at the trial of Smith some two months later as urged by petitioner) (Compare 484a-30 with explanation 493a-28 to 494a-20; See also: 516a-23; 517a-30; 528a-30; 531a-17; 543a-27); continued to the vicinity of the crime (531a-26 to 30), and then Smith was taken to Mahwah for arraignment (489a-26).

That the confession was voluntary, uncoerced, given without any threats, promises or violence is not only beyond question, but conceded.

Thus, DeMarco testified that Smith discussed the matters willingly without force, threats, or compulsion (489a-33); Chief Voss of Ramsey related that before giving the statement Smith was asked whether or not he wanted to give a voluntary statement under oath and that Smith said he would, and did (516a-27 to 33). Voss uncontradictedly supported DeMarco that no promises, threats, or violence was used and that Smith was in good shape and answered the questions without hesitation (516a-37 to 517a-10). Chief Smith confirmed that the statement was taken without threats, promises, duress, or coercion of any kind and that the same was voluntary (517a-34 to 518a-14) as did Detective Spahr (527a-30 to 529a-10), the Court Reporter Arthur

J. Ehrenbeck (532a-5 to 18), and the disinterested juror (543a-30 to 544a-35).

In fact, defendant's counsel admitted that the confession was voluntary (532a-30 to 35; 535a-26) although the Court permitted him thereafter to present the testimony of petitioner as to the circumstances under which the statement was given (537a-27 to 538a-40).

Even the petitioner herein did not seriously contend that the statement was wrung from him by threats, promises, coercion, or under circumstances indicating that the same was not his own voluntary act and deed.

He admitted that after being picked up at about 11:30 at night (539a-32) Mr. Galda discussed the matter with him (540-20). While he stated that in "excess of a dozen talked to him about the case" (540a-13) he admitted that only Galda questioned him and "on and off, not continually" (540a-34). Smith's only complaint, if we may call it such, was that on occasions he was cold and that when he "mentioned it to Mr. Galda" he was given Mr. Galda's overcoat (541a-4 to 12). He likewise admitted that Detective Sinatra permitted him to sit in the front seat of the car and turned on the heater (541a-33).

From the above, the conclusion is inescapable that from the time that petitioner was picked up until the time he gave his statement, very little time was spent interrogating him. Most of the time was spent searching for the shoes, pants, and the place where petitioner allegedly vomited; waiting with others who were interrogated, eating, visiting Dr. Gilady, and having pictures taken of his knees. Even petitioner admits that they spent at least two or three hours looking for the pants and shoes (541a-21).

That the procedure outlined above was for the purpose of solving the crime and even to absolve the suspect is clear.

Smith was not accused by Graber (433a-25), wasn't questioned by DeMarco (476a), wasn't accused by Galda (490a-20; 540a-23), and was never handcuffed (774a-19 to 31).

In fact, at the trial, the following took place (774a-33):

"Q. And you weren't mistreated at all during the day were you? A. No, sir.

Q. And as a matter of fact, after you got done—after you were arraigned you were taken by me over to the State Restaurant. Isn't that right? A. That's correct.

Q. And you had a pretty good meal, did you not? A. I think so.

Q. What did you eat? A. I had fried lobster tails.

Q. You had fried lobster tails and you smoked one of my cigars. Is that right? A. Yes."

Finally, we point to the statement itself (Exh. S-84, 1072a). A reading of the same makes clear that here was no massive interrogation by relays of police of a 15 year old held incommunicado without requested counsel as in the *Haley* case (332 U. S. 596 (1948)); no coercion, ill-treatment or positive proof of the involuntary nature of the confession from the District Attorney's summation found in *Malinski v. New York*, 324 U. S. 401 (1945); no thirty-six consecutive hours without sleep or rest while being held incommunicado as in *Ashcraft v. Tennessee*, 322 U. S. 143 (1944); no several day six to eight relays of questioning and confinement in the "hole" as in *Watts v. Indiana*, 338 U. S. 49 (1948) or the denial of requested counsel of an indicted defendant who faced persistent questioning despite his repeated refusal to talk, from whom a confession was extracted by physical and psychological pressure when he yielded to a false friend's entreaties as shown in *Spano v. New York*, —— U. S. ——, 3 L. ed. 2d 1265 (1959).

We point too, to the fact that at no time was defendant denied counsel, nor was he even arrested or formally charged with a crime at the time of the confession.

It should also be noted that in the *Spano* case, *supra*, the concurring opinion of Justices STEWART, DOUGLAS, and BRENNAN emphasizes, at page 1274:

> "Let it be emphasized at the outset that this is not a case where the police were questioning a suspect in the course of investigating an unsolved crime. See *Crooker v. California*, 357 U. S. 433, * * *; *Cicenia v. Lagay*, 357 U. S. 504, * * *."

Thus, in the confession itself, we find strong indicia that the same was given voluntarily during a temperate and courteous interview in which petitioner was allowed to interrupt as he saw fit, answer or not, and to talk without interruption.

Petitioner was introduced to those present (including a disinterested juror) (Exh. S-84, 1073a-11). He was asked if he would give a voluntary statement under oath (1073a-15 to 20); whether he cared for "coffee or anything" (1073a-28), and note this question and answer from the alleged coerced petitioner (1075a-36):

> "A. Yes. Can I ask a question here?"
>
> Q. Surely. A. Like I explained to you before I am a little fuzzy on this. As I go along, can I add on—
>
> Q. Certainly, just as you know the incident as it actually occurred—and you can interrupt at any time you want. A. That is what I want to do—interrupt."

Notice too, that rather than examination and cross-examination, petitioner related what occurred mostly in narrative form (1074a-23; 1075a-12; 1076a-16; 1077a-23 to 1078a-23; 1079a-29; 1080a; 1081a; 1082a; 1083a; 1084a;

1085a; 1086a); when he didn't remember, no pressure was exerted (1079a-12; 1088a-8; 1089a-8; 1092a-25; 1097a-13); nor when he said he didn't know (1087a-23; 1090a-30 to 40; 1091a-4 to 10); and when he asked to go to the men's room a recess was taken (1086a-40 to 1087a-10). Coffee was offered to him again (1097a-18) and again (1099a-29) and when requested, milk was sent out for and a recess taken (1099a-36 to 1100a-4).

Finally, we point to the following (1100a-13):

> "Q. What we are going to do now, on the places you indicated to us, we are going to go to the area. It will be with the same people in this room and we are going in two cars and you can point out these things you mentioned on the spot. *Is that agreeable to you?* A. *Yes.*
>
> Q. *And while you were in custody of the policemen and up at the Mahwah Police Headquarters, did anybody mistreat you or anything?* A. *No, sir.*
>
> Q. *Everybody treat you all right?* A. *Better than I expected.*
>
> Q. *I beg your pardon?* A. *Better than expected.*
>
> Q. *Very well. It's nice to hear.*" (Italics supplied)

Even when going over the scene of the crime and while going to the petitioner's trailer when the petitioner manifested concern about disrupting the baby and a desire not to go into the area, the Prosecutor acquiesced (1108a-22 to 40).

Was this the action of an inquisitor setting the stage for the "lamb" to be slaughtered? Was this the action of a cunning, cajoling, falsely sympathetic, gloating, skilled prosecutor bringing the petitioner to the brink of doom as word-pictured by counsel for petitioner? We submit that no group of law enforcement officials could have treated a suspect with more temperance, courtesy, or solicitude.

That the petitioner knew that he was giving the statement with reference to the killing of Vickie Zielinski is clear not only from the statement but from the fact that petitioner heard it on the radio, discussed it with Hommell and Gilroy, with his wife, and read it in the newspaper (665a-6 to 666a-10; 721a-30 to 725a-40). The statement by counsel for petitioner that Smith didn't even know of the killing when questioned is obviously without merit or support in the record.

The statement that petitioner was "'obliged' to change from his street clothes to *prison-denims*" (italics by petitioner) (Petition, p. 24) is a bald lie (523a-20) as is his statement (Petition, p. 15) that petitioner was held "from 11:00 the night of March 5th" "to about 1:00 p.m. of March 6th, with the extended inquisition and interrogation that led to the 'confession'" and "seven (7) hours more" "a total of twenty (20) hours" "unlawfully held" (See *supra* detailed procedure).

That defendant was not subjected to massive interrogation "in fact, twenty (20)" (Petition, p. 25) is clearly not only not supported by the record, but is obvious from the inclusion of Dr. Gilady, Stenographer Ehrenbeck, and every person who had anything to do with the case.

That petitioner did see a priest prior to giving his statement (751a) and not "supposedly" as stated by counsel for petitioner (Petition, p. 36) is also without question, as is the fact that petitioner told the same story as in his statement to three doctors on a separate occasion while in jail (783a-23), not at the time as when he saw the priest as stated by counsel for petitioner (Petition, p. 36).

While the Petition is replete with crass lies, half-truths, and outright falsehoods completely unsupported by any record references, we have pointed out the above merely as an example so that this Court should not be misled by

other unsupported statements made by the petitioner to which we have not referred.

We must, however, point to the false inference attempted to be created by petitioner when he refers to the disinterested juror, Kalstad, as being on the same panel as that from which the trial jury in this case was drawn, thus infecting another juror who sat at the trial some two months later (Petition, pp. 41, 42). Not only is this inference false since juror Kalstad sat in March, 1957 (107a, when the statement was taken, and juror Hundemann sat at the trial in May, 1957 (M.A101a), but the appeal taken from the denial of the new trial raised no issue that one of the jurors had been prejudiced and manifested prejudgement (29 N. J. 561 (1959)) by contact with Kalstad.

We submit that a careful reading of the record will clearly indicate that there are no conceded facts existent here which are irreconcilable with mental freedom. *Lisenba* v. *California*, 314 U. S. 219 (1941); *Lyons* v. *Oklahoma*, 322 U. S. 596 (1943) requiring this Court to intervene. On the contrary, we suggest that the uncontradicted, conceded facts clearly indicate that the petitioner was not denied due process of law in violation of the Fourteenth Amendment to the Federal Constitution in the admission into evidence of his voluntary statement. The holding of the Supreme Court of New Jersey comports with the decisions of this State both as to the admission into evidence of a voluntary statement, *Roesel* v. *State*, 62 N. J. L. 216 (E. & A. 1898); *State* v. *Jefferson*, 131 N. J. L. 70 (E. & A. 1943), and as to assistance of counsel, *State* v. *Grillo*, 11 N. J. 173 (1952), cert. den. *sub nomine*, *Grillo* v. *State of New Jersey*, 345 U. S. 976 (1953); *State* v. *Bunk*, 4 N. J. 46 (1952), cert. den. 340 U. S. 839 (1952); *State* v. *Cole*, 1 N. J. L. 606 (E. & A. 1949), cert. den. 334 U. S. 851 (1949); *State* v. *Murphy*, 87 N. J. L. 515 (E. & A. 1915). Nor is it

decision contrary to the decisions of this Court, *Crooker* v. *California*, 357 U. S. 433 (1958); *Cicenia* v. *Lagay*, 357 U. S. 504 (1958); *Ashdown* v. *Utah*, 357 U. S. 426 (1958); *Thomas* v. *Arizona*, 356 U. S. 390 (1958); *Anonymous* v. *Baker*, —— U. S. ——, 3 L. ed. 2d 1234, 1238 (1959).

What was said in *Stein* v. *New York*, 346 U. S. 156 (1953), at page 184 is peculiarly appropriate:

> "* * * Interrogation is not inherently coercive, as is physical violence. Interrogation does have social value in solving crime, as physical force does not. By their own answers many suspects clear themselves, and the information they give frequently points out another who is guilty. Indeed, interrogation of those who know something about the facts is the chief means of solution of crime. The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail as a material witness. This Court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appear reasonable and not coercive.
>
> Of course, such inquiries have limits. But the limits are not defined merely by calling an interrogation an 'inquisition', which adds to the problem only the emotions inherited from medieval experience. The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. * * *."

As to the number of officers involved in the questioning, the Court said, at page 185:

> "* * * It is also true that the questioning was by a number of officers at a time and by different officers at different times. But we cannot say that the use of

> successive officers to question these petitioners for the periods of time indicated is so oppressive as to overwhelm powers of resistance. While we have reversed conviction founded on confessions secured through interrogations by 'relays', we have also sustained conviction when, under different circumstances, the relay technique was employed. But we have never gone so far as to hold that the Fourteenth Amendment requires a one-to-one ratio between interrogators and prisoners, or that extensive questioning of a prisoner automatically makes the evidence he gives in response constitutionally prohibited."

As to delay in arraignment, the Court reiterated its long-standing pronouncement at page 187:

> "Petitioners confuse the more rigorous rule of exclusion which, in the exercise of our supervisory power, we have promulgated for federal courts with the more limited requirements of the Fourteenth Amendment. This, we have held, did not impose rules of evidence on state courts which bind them to exclude a confession because, without coercion, it was obtained while a prisoner was uncounseled and illegally detained. * * *."

See also: *Stroble* v. *California*, 343 U. S. 181, 197 (1952); *Brown* v. *Allen*, 344 U. S. 443, 476 (1953); *Gallegos* v. *Nebraska*, 342 U. S. 55, 63 (1951).

Nor is petitioner's reference to Rule 3:2-3 of the Rules of the Superior and County Courts, as a statutory provision of the Revised Statutes (Petition, pp. 7, 38) correct. In fact, the same is not a statutory mandate, but rather a rule of court, a violation of which has already been determined by the decisions of the State of New Jersey as not violative of due process even where the same was claimed. *State* v. *Bunk*, 4 N. J. 461 (1950), cert. den. 340 U. S. [illegible] (1950).

Petitioner now also urges for the first time that "the prosecutor's emissary stealthily" "'stole' into the prison, to prevail upon petitioner to sign the so-called 'confession' but upon his refusal tricked and cajoled him into 'acknowledging' its accuracy, which abortively served its purpose" (Petition, p. 44). Aside from the fact that petitioner never contended at the trial or on the appeal from the conviction that his confession was acknowledged by him in a manner violative of the Federal Constitution, the fact is that the decision on this aspect in the Supreme Court of New Jersey was based solely on State rule of evidence and non-federal basis. Thus, the Supreme Court of New Jersey held, 27 N. J. 433 (1958) at page 459:

> "A confession made by a defendant need not be signed by him to make the document itself admissible. If it was read over to the accused, or by him, if it was signed or otherwise admitted by him to be correct, it is admissible. *State* v. *Monahan*, 16 N. J. 83 (1954); *State* v. *Cleveland*, *supra*; *State* v. *Foulds*, 127 N. J. L. 236 (E. & A. 1941); *State* v. *Donato*, 106 N. J. L. 387 (E. & A. 1930); *State* v. *Lustberg*, 11 N. J. *Misc.* 51 (Sup. Ct. 1933); Admissibility in evidence of unsigned confession, 23 A.L.R. 2d 919."

It follows, of course, that there is no State statute here involved that requires interpretation under the United States Constitution not heretofore decided by the highest Court of New Jersey as presented by petitioner as a reason for granting the writ (Petition, p. 12).

To conclude this Point, we vigorously deny that the confession was the sole evidence of the State's case, as baldly stated by petitioner (Petition, pp. 2, 12, 13). In fact, as declared by the Supreme Court of New Jersey in both appeals (27 N. J. 433, 462 (1958)):

> "* * * We are convinced, however, that the accumulation of evidence was more than sufficient to justify a finding of guilt beyond a reasonable doubt. Clearly, defendant's conviction was warranted."

And in 29 N. J. 561 (1959) at page 575 (Motion for new trial appeal) the Court said:

> "* * * We have re-examined the original record, as well as the earlier opinion, and find no basis whatever for withdrawing from or qualifying our determination that the evidence was devastatingly convincing of the defendant's guilt. * * *."

We submit that if we eliminate the unfounded assertions made by petitioner, the half-truths and bald lies which find no support in the record, we are left only with the uncontradicted fact that petitioner who conceded that he was not mistreated, after a closed door conference with his requested spiritual advisor, gave a voluntary statement, thrice repeated to doctors, confessing the circumstances under which he committed the crime.

That this case and the decision of the Supreme Court of New Jersey present no federal question or basis for review, nor does it represent a departure from the decisions of this Court, clearly and convincingly appears.

## POINT THREE

**The Court's ruling denying the request that defendant be present at the hearing of the motion for a new trial presents no federal question of substance, nor is it contrary to the decisions of this Court.**

The Supreme Court of New Jersey, in reviewing petitioner's contention that error was committed in the trial Court's denial of a request to have petitioner attend the hearing on the motion for a new trial, pointed out that (29 N. J. 561 (1959) p. 577):

"* * * There was no statement on the motion that Smith was to be a witness; on the contrary, the moving papers contained material which was beyond Smith's personal knowledge. Nor was any representation made to the court thereafter during the hearing or at the conclusion of the testimony or even after the adverse determination that defendant had pertinent information to present in rebuttal. At the oral argument before us counsel stated that Smith could have questioned the assertion of one witness, who had been in attendance at Pelzer's Tavern on the evening of March 4, that he did not know D. H. Accepting the representation, such rebuttal, if introduced, could not have affected the result. Complete elimination of the witness' testimony would be without material significance in the case."

The Court concluded, *supra*, page 578:

"* * * The weight of authority in other jurisdictions is that the constitutional right to be present applies to the trial, the proceeding for the determination of the guilt or innocence of the accused. It does not require his appearance at a post-conviction hearing on a motion for a new trial. * * * (citing cases). Our rules of criminal practice reflect the general rule. R.R. 3:5-4(a) calls for the presence of the defendant 'at every stage of the *trial* including the impaneling of the jury and the return of the verdict, and at the imposition of sentence * * *'* * *." (Emphasis by Court).

Aside from the fact that petitioner at the trial never contended that he had any constitutional right, State or federal, to be present at the motion for a new trial hearing (MA17a-26 to MA18a-26), can it be said that under the circumstances here disclosed there was a denial of petitioner's constitutional rights contrary to the decisions of this Court?

We submit that this cannot be. The defendant was represented by counsel at the hearing on the motion for a new trial unlike *Chessman* v. *Teets*, 354 U. S. 156, (1957) cited petitioner (Petition, p. 62) and *United States* v. *Hayman*, 342 U. S. 205 (1952) held only that under the 1948 revision of the Judicial Code applicable to the federal courts, the petitioner's request to be present at the hearing on his application to vacate a sentence under §2255 should have been granted where the testimony taken pertained to fundamental issues of fact as to events in which he had participated and the testimony was taken without notice to him and not in his presence.

It should be noted, however, that the Court significantly stated, in the last cited case, at page 222:

> "The existence of power to produce the prisoner does not, of course, mean that he should be automatically produced in every §2255 proceeding. This is in accord with procedure in habeas corpus actions. Unlike the criminal trial where the guilt of the defendant is in issue and his presence is required by the Sixth Amendment, a proceeding under §2255 is an independent and collateral inquiry into the validity of the conviction. * * *."

Where, as here, assuming for the moment that the Sixth Amendment is applicable, the petitioner had no pertinent information to present in rebuttal and had not participated in any of the events which were testified to, it cannot be said that he was prejudiced in any way.

While petitioner urges (Petition, p. 62) that the issue raised at the hearing concerned itself primarily with a "false alibi" presented by a "prime suspect" implicated by petitioner by placing him at the scene of the crime, this question had already been authoritatively determined by a jury and sustained on appeal.

The Court stated (27 N. J. 433 (1958)) at page 464:

"Smith testified D. H.'s threat was delivered on Main Street in Ramsey at approximately 9:20 p.m. on the night of March 4. D. H. stated he did not see Smith at all on the night of March 4 and that at 9:20 p.m. he was in a tavern a number of miles away. A friend of both D. H. and Smith confirmed D. H.'s presence in the tavern at the time in question. Furthermore, according to Smith's story at trial, D. H. must have appeared at the sand pit between 8:30 and 9:00 p.m. Yet the pharmacist at the drugstore where D. H. worked testified D. H. was sent to pick up merchandise at another drugstore in Ridgewood, a 16 to 20-minute trip according to one of the officers who clocked it, at 8:35 p.m. and returned shortly before 9:00 p.m. with the right package, not leaving the store again until shortly after 9:00 p.m. The combined and impressive testimony of D. H.'s 'alibi' witness is totally incompatible with defendant's position that D. H., not he, killed Victoria.

Additionally, all of the incontrovertible physical facts point to defendant's guilt as do his actions after his admitted struggle with Victoria."

In *Chessman* v. *Teets*, *supra*, the Court took pains to state, at page 164:

"* * * All we hold is that consistently with procedural due process, California's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determing cannot be allowed to stand."

In any event, the law is clear in New Jersey and elsewhere that it is not necessary that the accused be present at the hearing of a motion for a new trial, even though tes-

timony for or against the motion is taken, and notwithstanding the accused is given, by statute or by constitutional provision, the right to be present during his trial, because the hearing on a motion for a new trial is not a part of the trial. *Barber* v. *United States*, 142 F. 2d 84 (4 Cir. 1944), cert. den. 322 U. S. 741 (1944); *Jones* v. *State*, 236 Ind. 529, 141 N. E. 2d 109 (1957), cert. granted but limited to a different question, 355 U. S. 812 (1957); 23 *C.J.S. Criminal Law* § 974, 1504, pp. 307, 1325; *State* v. *Beatley*, 46 N. J. Super. 193, 204 (App. Div. 1957); *Nee* v. *State*, 6 N. E. 2d 570, 572, 211 Ind. 228 (Sup. Ct. 1937); *Council* v. *Clemmer*, 177 F. 2d 22, 24 (C. A. D. C. 1949), cert. den. 338 U. S. 880 (1949).

While petitioner makes much of the testimony of one Herbert Pelzer (Petition, pp. 60, 62), suffice it to say that the trial Court found him to be "a thoroughly unreliable, incredible witness, careless with the truth who has made so many varying, unfounded, untruthful statements" * * * "that no person, no juror could give any statement he might make in that respect any credibility whatsoever" (29 N. J. 561 (1959)), at page 574. The Supreme Court of New Jersey held, with reference to his testimony, at page 574, *supra*:

> * * * * And study of it in relation to the entire record leaves an abiding conviction of its untrustworthiness. Judged by the most liberal standard, it would not justify this court in declaring that the trial court abused his discretion in rejecting it as a basis for vacating the verdict of the jury."

Even Selser, attorney for petitioner, stated on inquiry by the Supreme Court of New Jersey, that he didn't call Pelzer at the trial because he "did not believe him" and that moreover, he was "under the influence of intoxicating liquor" at the time. 29 N. J. 561, 570 (1959).

The final thrust of petitioner relates to a claim that "at least one juror had unlawfully expressed and communicated his prejudged and prejudicial opinion while the trial was in progress." (Petition, p. 60).

Aside from the fact that this charge was completely refuted at the hearing on the motion for a new trial, the record discloses that on the appeal of the denial of a new trial, petitioner abandoned completely any such charge and the question was never presented to the New Jersey Supreme Court as a State or federal question.

We submit that it clearly appears that the Court's ruling below denying the request that petitioner be present at the new trial-hearing presents no federal question of substance meriting consideration by this Court, nor is the decision of the Supreme Court of New Jersey contrary to the decisions of this Court.

## CONCLUSION

The attempt by the petitioner to bring the case at bar within the scope of the review power of this Court as shown, *supra*, is actually frivolous and without merit. The questions presented here were never raised in the trial court, presented to the highest Court of New Jersey, or passed upon by said Court. The decision of the New Jersey Supreme Court was based solely and exclusively upon State decisional law and represents no departure from the State law, nor is it contrary to the decisions of this Court.

**We submit that no substantial federal question meriting review by this Court is properly raised in the instant case, and for this and the reasons hereinbefore set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.**

Respectfully submitted,

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